

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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SE:W:CAR:MP:T

from: Charles B. Christopher
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(Disclosure & Privacy Law)

subject: Disclosure of tax return information by Tax Counseling for the Elderly Program Volunteers

Background

The purpose of this memorandum is to provide guidance to sponsors and volunteers of the Tax Counseling for the Elderly ("TCE") Program regarding disclosures of tax return information by TCE volunteers. In providing this analysis, we have looked to applicable statutes and case law, utilizing the policy principles of taxpayer confidentiality, as codified in 26 U.S.C. § 6103.¹

As the sponsor of the TCE Program, the Internal Revenue Service strives to instill the principles that the public trust must be protected and that the confidentiality of taxpayer information is guaranteed. In addition to following the Service's principles regarding privacy and confidentiality, TCE volunteers are bound by the provisions of 18 USC § 1905 through operation of Section 163(c)(1) of Public Law 95-600, which established the TCE Program.

18 U.S.C. § 1905, otherwise known as the Federal Trade Secrets Act ("TSA"), criminalizes the unauthorized disclosure of confidential information by government employees. Public Law 95-600 clearly designates that TCE volunteers shall be treated as if they were federal employees under the TSA. Therefore, it is incumbent upon TCE volunteers to maintain the confidentiality of the information provided by taxpayers utilizing TCE Program services or else risk misdemeanor sanctions of a fine of not more than \$1,000 or imprisonment of not more than one year, or both, in addition to being automatically removed from the volunteer position.

While it is not possible to anticipate every disclosure situation that may arise for TCE volunteers, this memorandum will discuss the application of 18 U.S.C. § 1905 to seven possible scenarios involving the disclosure of tax return information by TCE volunteers. These scenarios are designed to provide assistance to TCE volunteers, but are not designed to be a comprehensive list addressing every disclosure situation that a TCE volunteer may potentially encounter.

¹ Note that Section 6103 does not apply to the information being processed by the TCE Volunteers because the returns have not been filed with the Service and, thus, do not yet constitute "returns" under Section 6103(b)(1).

Law

The Trade Secrets Act prohibits an officer or employee of the United States from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties. "Information coming to him in the course of his employment or official duties" also includes information coming to him by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof. Additionally, the TSA prohibits an officer or employee to permit any income return or copy thereof to be seen or examined by any person except as provided by law.

While no reported cases directly address the situation of volunteers handling confidential taxpayer information, some cases interpreting the TSA have clarified the application of 18 USC § 1905. First, the TSA prohibits the public disclosure of taxpayer information, not the internal agency use of submitted data. See *Tri-Bio Laboratories, Inc. v. United States of America*, 836 F.2d 135 (3d Cir. 1988). Thus, under this court ruling, it is clear that disclosures between TCE volunteers that are necessary to facilitate the TCE Program objectives of providing free tax return preparation for elderly taxpayers, amount to internal agency use of the taxpayer's information and should be considered as having been made "as authorized by law."

Additionally, section 1905 prohibits the disclosure of information by a federal employee only if the information is confidential, in the sense that it is the official policy of the agency in question (or is otherwise required by statute or regulation) that the information not be released. See *United States v. Wallington*, 889 F. 2d 573 (5th Cir. 1989). As mentioned above, it is the official policy of the Internal Revenue Service that public trust must be protected and confidentiality guaranteed to those utilizing the TCE services. Publication 4299, Privacy and Confidentiality, A Public Trust, outlines this policy in detail on page one of the document:

Taxpayers utilizing volunteer program services provide personal information to the volunteers, such as names, addresses, social security numbers, birth dates, and bank account information. This type of information is a prime target for identity theft. Therefore, partners and volunteers must keep the information confidential and protect it from unauthorized individuals and misuse.

Disclosure Scenarios

The critical element for TCE volunteers is to avoid publicly divulging or disclosing of confidential taxpayer information. Generally, when a volunteer divulges or discloses taxpayer information within the course and scope of his duties as a TCE volunteer, such disclosure should be considered as having been made "as authorized by law." Conversely, if a disclosure is made for a purpose other than to advance the TCE Program objective of providing free tax return preparation for elderly taxpayers, such disclosure will likely be considered as *not* being authorized by law. Ultimately, however, whether or not the divulging or disclosing of confidential taxpayer information is allowed will depend on the facts and circumstances of the situation.

1. Mr. Jones needs assistance in completing his tax return and visits a local TCE site. Mr. Jones is hearing impaired and arranges to have an interpreter accompany him to the site.

Can the volunteer assigned to help Mr. Jones discuss his personal information with the interpreter for the purposes of completing his return? Is it any different if the TCE site arranged to have the interpreter present at the site for Mr. Jones' benefit?

Answer: Any disclosures made to the interpreter are directly related to the TCE Program objectives of providing free tax return preparation for elderly taxpayers. Assuming that Mr. Jones agrees to having the interpreter present, the disclosures would be permissible under the TSA, so long as the disclosures are restricted to the information needed to complete the return.

2. Nancy is a TCE volunteer who has just finished completing Mr. Brindle's federal tax return using the TaxWise software program provided by the IRS. Mr. Brindle came to the TCE site for assistance and elected to have his return electronically filed. During the electronic filing process Mr. Brindle's return was rejected. Can Nancy contact the software vendor's customer support department to troubleshoot the problem so that Mr. Brindle's return can be successfully transmitted?

Answer: Nancy's disclosures to the software vendor's customer service personnel for assistance with the transmission of Mr. Brindle's federal tax return would be an authorized disclosure under the TSA, so long as her disclosures are limited to the items needed to troubleshoot the technical error.

3. Joe and David are TCE volunteers and good friends. After their shift is over at the TCE site they decide to go get some dinner at a local restaurant. During the course of their dinner and conversation, Joe divulges the name and income of a taxpayer that he assisted earlier in the day, which he found interesting. Is this an allowable discussion? Does it differ if David didn't know the taxpayer whose personal information was divulged?

Answer: Whether or not Joe's disclosure would be considered "as authorized by law" will depend upon his intent in sharing the information. For example, if David has a need to know about the "interesting" material so that he can learn from the situation and perform better as a TCE volunteer, then the disclosure will likely be authorized. However, if the purpose of the discussion is merely to gossip about who has come into the site or what his or her return information contains, with no purpose of advancing the administration of the TCE program, then Joe's disclosure will likely not be authorized by law. In this latter case, it would not matter whether or not David knew the taxpayer being described; the important factor is Joe's improper disclosure.

4. Matthew is a TCE volunteer working at a site. Matthew has been assigned to be the designated Quality Reviewer for the site where he reviews all completed tax returns to double check the volunteers' work. Is it allowable for volunteers at the site to bring the returns they have completed to Matthew? What about the smaller TCE sites that do not have a designated Quality Reviewer where volunteers must review each other's completed returns? What if Matthew or the volunteer who is quality reviewing the other volunteer's work has a question pertaining to the information on the return; can he discuss it with the volunteer who completed the return?

Answer: The disclosures made to and by Matthew as Quality Reviewer are directly related to the TCE Program objectives of providing free tax return preparation for elderly taxpayers and are authorized by law. Additionally, disclosures made to and by volunteers at sites who review each other's work or to resolve questions pertaining to information on a return is also permissible under the TSA. It is not critical that each volunteer personally completed the return for the taxpayer; what is critical is that their activities and their viewing of the taxpayer returns is for the sole purpose of working within the TCE Program to complete tax returns.

5. Robert is a TCE volunteer who assisted Ms. Brown in completing her tax return. After Ms. Brown left the site Robert received notice that her return could not be successfully electronically filed and the return was rejected. In order to complete her return, he needs some additional information from Ms. Brown. Robert telephoned her home number and a gentleman answered the phone insisting he was Ms. Brown's son in charge of her finances and the matter could be discussed with him. Can Robert discuss Ms. Brown's information with him? What if the "son" produces a power of attorney document authorizing his responsibility over her financial matters?

Answer: Robert cannot discuss the contents of Ms. Brown's tax return over the phone with the gentleman who insists that he is Ms. Brown's son. This is because the person has not submitted to the TCE a valid power of attorney form signed by Ms. Brown designating the gentleman as her representative. If the person were to produce a power of attorney in person, Robert's discussions with the son, which are necessary to complete Ms. Brown's returns, would constitute permissible disclosures.

6. Kelly is a TCE volunteer at a very large site that produces a significant amount of electronically filed returns. Kelly is in charge of the electronic transmission of every return filed at the site, including working the return through its completion. This involves Kelly accessing the electronic file of each taxpayer's tax return in order to transmit the file. Is this allowable if Kelly was not the same volunteer who actually completed the return when the taxpayer was present at the site? If there is trouble during the transmission can Kelly discuss information on the return with a representative from TaxWise, the software vendor? What about making contact with the taxpayer?

Answer: As in scenario two, Kelly's disclosure to the representative from TaxWise, to the extent necessary to effectively troubleshoot the transmission of the return, is authorized. Finally, Kelly is also authorized to contact the taxpayer, so long as reasonable steps are made to verify the identity of the taxpayer and to maintain confidentiality of the taxpayer's information.

7. Bonnie is a TCE volunteer at an electronic filing site. One day a man comes into the site loudly threatening the volunteers and taxpayers. The man proceeds to rip the cords from the laptop computer that Bonnie was working on and run out the door with it. Has Bonnie divulged information coming to her in the course of her official volunteer duties or has she permitted an income return to be seen or examined by any person in a manner not authorized by law?

Answer: Bonnie has not “published, divulged, disclosed, or made known in any manner or to any extent not authorized by law” information available to her within the course of her volunteer duties. Bonnie is not compelled by the TSA to risk her life fighting the threatening man for the computer. What the TSA prohibits is Bonnie’s own personal actions in disclosing protected taxpayer information. In this case, taxpayer information has been released in an unauthorized manner, but it is due to the intervening act of a threatening man who stole the laptop, not Bonnie’s actions. Similarly, Bonnie will not face any prosecution under the TSA for allowing the man to examine the tax returns; instead, it is the man’s criminal acts of intimidation and theft that may lead to his illegal viewing of the returns.

Summary

Sponsors and volunteers of the TCE Program should be aware of the provisions of 18 U.S.C. § 1905, otherwise known as the Federal Trade Secrets Act (“TSA”), which criminalizes the unauthorized disclosure of confidential information by government employees. While this memorandum discusses common situations arising in the TCE Program with the goal of providing guidance to volunteers, it is not possible to give absolute rules as to which disclosures would be authorized. Generally, disclosures made within the TCE Program that are necessary to facilitate the program objectives of providing free tax return preparation for elderly taxpayers will be protected as being made “as authorized by law.” Conversely, disclosures made to persons whose identity or authority to represent the taxpayer have not been confirmed, or for purposes other than to advance the TCE program goals, will not be protected as having been made “as authorized by law.”